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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. BRANDON ANTHONY CRAWFORD, Defendant and Appellant.	B207287 (Los Angeles County Super. Ct. No. KA 080132)

APPEAL from a judgment of the Superior Court of Los Angeles County. Tia Fisher, Judge. Affirmed.

William J. Capriola, under appointment by the Court of Appeal for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Steven G. Matthews and Timothy M. Weiner, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Brandon Anthony Crawford appeals his conviction of one count of attempted murder (Pen. Code, §§ 667, 187, subd. (a)), with a true finding that he personally and intentionally discharged a firearm causing great bodily injury or death (Pen. Code, § 12022.53, subds. (b), (c), and (d).) He contends the prosecution improperly exercised a peremptory challenge in violation of *Wheeler*,[1] the trial court improperly instructed the jury on his claim of self-defense, and cumulative error compels reversal. We affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. Prosecution Case.

On July 27, 2007, Robert Mejia, the victim, went to a party at his friend Stephanie Lara's house. Mejia arrived about 7:30 p.m., and Lara asked him to stay by the front door and not let anyone into the party that she did not know. Mejia had three cups of beer while he was standing at the front. At about 8:00 p.m., people started to arrive. In total, there were about 60 to 70 people at the party. There were two vehicles in the driveway, and Mejia's car was blocking them.

At about 10:00 p.m., defendant arrived at the party with four other males. Mejia recognized defendant and two of the other men with him, Rene and Ryan, because they were friends. Mejia let Rene into the party, but told him the other men they could not come in. Mejia heard defendant say under his breath, "I'll sleep that nigga." Mejia looked at him and laughed. Mejia got a good look at defendant and what he was wearing. Defendant and his group walked down the driveway, and Mejia lost track of them.

Later, Ryan came back to the party by himself. Mejia refused to let him in again, and Ryan, who was Asian, got into a fight with a White man. Ryan fell to the ground. Mejia jumped on top of Ryan and picked him up, and he told the two men they could not fight.

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[1] *People v. Wheeler* (1978) 22 Cal.3d 258.

Down the street, a second fight had broken out among about 10 people. One person, the White man who had attacked Ryan, was being attacked by a group of other people. The fight was getting near Mejia's car, and he was concerned. The man being attacked ran towards Mejia's car. Mejia told them to get away from his car, and Ryan came over to Mejia and punched him in the face. Mejia saw defendant coming towards him and defendant hit him in the head. Mejia was trying to take his shirt off so he could fight back. He pushed Ryan away and hit defendant.

At some point, only Mejia and defendant remained in the fight. Defendant fell to his knees and Mejia was in front of him. Defendant tried to get up. Defendant reached under his shirt, and Mejia saw a gun with a bandana wrapped around the handle. Mejia started to back away.

Defendant stood up, pointed the gun at Mejia and fired two shots at him. At the time, no one was attacking defendant, nor was there anyone near him. Mejia was about eight or nine feet away, and defendant was looking right at him. Mejia started to run away, and after a pause, defendant shot him two more times. Mejia heard a total of five shots. The area was well lit and Mejia got a good look at defendant.

Mejia ran behind a car, and blacked out. He did not remember going to the hospital. When he spoke to detectives in the hospital, he told them defendant had shot him.

Sara Cecil attended the party with some friends from work, and arrived about 10:30 p.m. Cecil did not have any alcohol at the party. At about 11:15 p.m., after Stephanie Lara asked people to leave the party, Cecil left the house and saw about 10 people fighting in the street. She watched the fight for about three minutes, and then saw a smaller confrontation. She recognized defendant. Defendant grabbed a gun from his pants, pointed it and started shooting. She heard four shots. Defendant was not fighting with anyone at the time he fired the gun. She did not see where defendant went after the shooting.

Kyle Hernandez was a friend of Stephanie Lara, and stood in front of the house to help Mejia. He had one or two beers. About 9:00 p.m. defendant came to the front door

with about eight people. Hernandez knew defendant from school and got a good look at him. Later, Hernandez saw about 15 people fighting in front of the house. He heard four or five gunshots. He was about 15 feet away, and saw defendant, who was the shooter, walking backwards towards him. No one was close to defendant at the time he fired the shots.

B. Defense Case.

Deputy Michael Dlugos[2] responded to the shooting. He spoke to Hernandez, who told him that he was standing on the sidewalk and saw a fight break out. Hernandez saw a Black male pull out a handgun and fire four or five shots. Hernandez did not tell Dlugos who the shooter was.

Casey Ward went to the party at Lara's with his friend Tim Johnson; they arrived at about 10:00 or 10:30 p.m. Mejia let them into the party. He knew defendant from school, and saw him in the backyard at the party; defendant was still in the backyard when Lara began to ask people to leave the party. When Ward got to the front yard, he saw the fights, but he did not see defendant involved in any of the fights. He heard three shots, but he did not get a good view of the shooter, who was wearing a hooded shirt which was pulled over his head. He did not see anyone around the shooter. Defendant had not been wearing any clothing that covered his head.

Jordan Harper got to the party about 9:00 p.m. He met defendant and several other young men he knew from school. At first, Mejia would not let them into the party. Mejia smelled of alcohol and had a drink in his hand. Although there were no problems with anyone, Mejia was "trying to cause problems from out of nowhere." They had to pay to get in, and Mejia let all of them in. After about an hour, everyone was asked to leave. He left the party and saw defendant and Rene in front. He saw two fights going on in front of the house, and heard shots. Harper saw defendant on the ground. His eyes were closed and there was no one near him. He did not see the shooter. After the shots were fired, he picked up defendant and put him in Rene's car, and they left.

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[2] The record does not disclose Deputy Dlugos's law enforcement affiliation.

Domunique Ruff is a friend of defendant. Ruff went to the party with Eric Ragi. They both got to the party about 10:30. They saw Rene, Harper, and defendant. Mejia was at the door. Mejia thought defendant had made a comment, so "he started getting all wild and crazy" and started swearing at them.

Mejia let all of them in. There were about 150 people at the party. After everyone was asked to leave the party, a big fight broke out in the middle of the street. Rene and Ragi were involved in this fight, and Ruff got involved in the fight and kicked someone. From about 30 feet away he saw defendant getting hit by four other people, one of whom was Mejia. The people hitting defendant were standing in a circle around him. It looked like defendant was trying to defend himself, but Ruff did not see a gun in defendant's hand. Ruff heard shots fired, and the fights stopped immediately. Ruff ducked and crawled back to his car and left with Ragi. He did not see defendant again that night.

Kathy Pezdek, a psychology professor at Claremont Graduate University, and an expert in cognitive psychology, testified that memory is a three-stage process: the perception stage, the storage phase, and the recall phase. If the witness does not see clearly at the perception stage, no matter what happens later, they are not likely to identify the person correctly. If the person being observed is holding a weapon, less time is spent looking at the person's face. Alcohol consumption affects perception, and so does cross-racial identification.

Frankie Monteveros, a friend of Stephanie Lara, arrived at the party about 9:00 p.m. Mejia was very obnoxious to him at the front of the party, and was swearing at him. He saw defendant inside at the party. When he left the party, he saw crowds of people in the front, but he did not see defendant. He heard two gunshots come from the direction of the house, and ducked.

The jury found defendant guilty of attempted murder (§§ 664, 187, subd. (a)), found the firearm use allegations true (§ 12022.53, subds. (b), (c), and (d)), but found not true the allegation that he acted with premeditation (§ 664, subd. (a)).

DISCUSSION

I. NO *WHEELER* ERROR.

Defendant, who is African-American, contends that the prosecution's exercise of a peremptory challenge to the sole African-American juror violated *People v. Wheeler, supra,* 22 Cal.3d 258 and *Batson v. Kentucky* (1986) 476 U.S. 79.

A. Factual Background.

Juror No. 9, the challenged juror, was married with four grown children and worked for the California Department of Corrections at the Chino Institution for Men. He had worked for the State for 30 years, and started with the California Air National Guard. At Chino, he worked in plumbing and electrical repair and supervised inmates. He was frightened to be working with inmates at first, but it is not a high security situation and he has not had any problems with them. While he had not witnessed any inmate-to-inmate violence, he had seen the results. He did not believe his work at the prison would affect his ability to be a fair and impartial juror.

The defense objected to the prosecution's challenge. Defendant argued that the prosecution had excused the only African-American juror, and that he did not see any reason why Juror No. 9 would not have been fair; he had experiences that could be viewed as favorable to either side.

The prosecution noted that it challenged Juror No. 2, a Caucasian male pastor who had not reported a crime to the police that involved a knife attack on him. The prosecution argued Juror No. 2 would be sympathetic and forgiving to crimes. Previously, the prosecution had exercised a peremptory challenge against a Catholic Hispanic woman who worked at a probation department camp where she performed ministry for the same reasons. The prosecution also exercised a challenge against Juror No. 8, a Caucasian male pastor who had worked as a civil attorney and police officer.[3]

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[3] Juror No. 8, who was married with three grown children, was a senior pastor of an inter-denominational church and an inactive member of the state bar. His wife was a retired bank teller who had been robbed at gunpoint. Juror No. 8 retired from his law practice about 25 years ago when he became a pastor. Prior to that, he was a member of

With respect to Juror No. 9, the prosecution noted that he worked at Chino and spoken with inmates, who told him about their crimes. The prosecution believed the same factor causing him to challenge Juror Nos. 2 and 8 – sympathy – would be present in Juror No. 9.

After receiving the prosecution's reasons for its challenges, the court found defendant had established a prima facie case. Defendant responded to the prosecution's explanation for its challenges by noting that although Juror No. 9 may have listened to the inmates' stories at Chino, he did not indicate that he was sympathetic towards them or biased. The court found that the prosecution's explanation credible. The court noted that Juror Nos. 8 and 9, but for the color of their skin, were interchangeable; both were straightforward, but had extensive contact with people in the system. The court found the prosecution had "expressed very cogent and concrete reasoning and thoughtful rational responses in terms of what you are looking for. And they do share unlike . . . any of the other jurors . . . unique features. . . . [¶] . . . [¶] . . . [Your concerns] in terms of their ability ultimately to convict if you prove the case beyond a reasonable doubt, your reasoning in terms of whether those individuals who have worked in pastoral care or in institutions with inmates and had relationships with inmates, that is what you've expressed as your concern, that if you prove the case they might not be able to come back with a guilty verdict because [ ] that background is appropriate." The court concluded the prosecution's challenge to Juror No. 9 was not based upon race and was not discriminatory, and denied the motion.

B. Discussion.

Both the federal and state constitutions prohibit the use of peremptory challenges to exclude prospective jurors based on race. (*People v. Lenix* (2008) 44 Cal.4th 602, 612 (*Lenix*).) To resolve a *Batson/Wheeler* motion, the trial court must first determine whether the defendant has made a prima facie showing that the prosecutor exercised a

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the Maryland State Police for about five years. He did not believe his faith or his background in the law would make him biased or cause him any problems in applying the law.

peremptory challenge based on race. If such a showing is made, the prosecution must demonstrate that the peremptory challenge was exercised for a race-neutral reason. The court must determine whether the defendant has proven purposeful discrimination. The ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the movant. (*Lenix, supra,* at pp. 612-613.)

The party asked to explain a challenge must provide a clear and reasonably specific explanation of his or her legitimate reasons for exercising the challenges. (*Lenix, supra,* 44 Cal.4th at p. 613.) The justification need not support a challenge for cause, and even a trivial reason, if genuine and neutral, will suffice. (*Lenix, supra*, at p. 613.) "A prospective juror may be excused based upon facial expressions, gestures, hunches, and even for arbitrary or idiosyncratic reasons. [Citations.] Nevertheless, although a prosecutor may rely on any number of bases to select jurors, a legitimate reason is one that does not deny equal protection." In the third stage of the *Wheeler/Batson* inquiry, the focus is on the credibility of the race-neutral explanations. "Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy.'" (*Lenix, supra,* 44 Cal.4th at p. 613, quoting *Miller-El v. Cockrell* (2003) 537 U.S. 322, 339.) "In assessing credibility, the court draws upon its contemporaneous observations of the voir dire. It may also rely on the court's own experiences as a lawyer and bench officer in the community, and even the common practices of the advocate and the office who employs him or her." (*Lenix, supra,* 44 Cal.4th at p. 613.)

Our review of the trial court's denial of a *Wheeler/Batson* motion is deferential, and we examine whether substantial evidence supports its conclusions. "We presume that a prosecutor uses peremptory challenges in a constitutional manner and give great deference to the trial court's ability to distinguish bona fide reasons from sham excuses. [Citation.] So long as the trial court makes a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on

appeal. [Citation.]'" (*Lenix, supra,* 44 Cal.4th at pp. 613-614, quoting *People v. Burgener* (2003) 29 Cal.4th 833, 864.)

Further, it is proper to engage in comparative juror analysis on appeal. "Comparative juror analysis is but one form of circumstantial evidence that is relevant, but not necessarily dispositive, on the issue of intentional discrimination." (*Lenix, supra,* 44 Cal.4th at p. 622.) We must consider such evidence if the defendant relied on it and the record is sufficient to permit review of the comparison. However, our review is circumscribed; we need not consider responses by stricken panelists or seated jurors other than those identified by defendant. (*Id.* at p. 624.)

Here, the record demonstrates the prosecution's reasons for excusing Juror No. 9 were race neutral. The prosecution believed that Juror No. 9 would have difficulty convicting because of his work with prisoners. A juror may be dismissed because of his or her occupation. (*People v. Reynoso* (2003) 31 Cal.4th 903, 925.) The prosecution also believed Juror No. 9 would be overly sympathetic towards the defendant, which is a neutral ground for dismissal. (*People v. Stanley* (2006) 39 Cal.4th 913, 945.)

Comparative analysis also demonstrates the prosecution's challenge to Juror No. 9 was not improper. As the court noted, Juror Nos. 8 and 9 were interchangeable, except for their race, and both had backgrounds that would make them less likely to convict. Juror No. 2, who was also White, had shown sympathy for persons committing crimes and was excused on that basis. The consistency in the factors underlying the prosecution's reasons supports the trial court's conclusion that they were not based upon improper bias.

II. NO ERROR IN INSTRUCTING WITH CALCRIM NO. 3472.

Defendant argues that the trial court's instruction with CALCRIM No. 3472 on contrived self-defense deprived him of his right to present a defense and conflicts with another instruction given, CALCRIM No. 3471, on the aggressor's right to self defense. He contends the error is prejudicial because the jury rejected the premeditation allegation and found murder rather than voluntary manslaughter. We find no error.

A. Factual Background.

The trial court instructed the jury with CALCRIM No. 3472, which provides "A person does not have the right to self defense if he or she provokes a fight or quarrel with the intent to create an excuse to use force." Defendant did not object. The trial court also instructed the jury with CALCRIM No. 3471 as follows: "A person who engages in mutual combat or who is the first one to use physical force has a right to self-defense only if: [¶] 1. [He] actually and in good faith tries to stop fighting; AND [¶] 2. [He] indicates, by word or by conduct, to his opponent, in a way that a reasonable person would understand, that he wants to stop fighting and that he has stopped fighting; AND [¶] 3. He gives his opponent a chance to stop fighting. [¶] If a person meets these requirements, he then has a right to self-defense if the opponent continues to fight. [¶] If you decide that the defendant started the fight using non-deadly force and the opponent responded with such sudden and deadly force that the defendant could not withdraw from the fight, then the defendant had the right to defend himself with deadly force and was not required to try to stop fighting."

During deliberations, the jury asked the court, "Does initiation of a fight eliminate the charge of attempted voluntary manslaughter? Because it eliminates self-defense."

The court stated it was breaking the jury's question into two parts: (1) whether initiation of a fight eliminated the charge of attempted voluntary manslaughter, and (2) whether initiation of the fight eliminated self-defense. The court advised the jury that the fact the defendant initiated the fight did not eliminate the charge of attempted voluntary manslaughter, and referred the jury to the instructions on voluntary manslaughter and imperfect self-defense. The court further instructed the jury that repetition of any rule, direction or idea in the instructions was not intended as emphasis; the jury was not to single out any particular sentence or point in an instruction and ignore the others in the same instruction; and they were to consider each instruction as a whole and in light of the other instructions.

B. CALCRIM Nos. 3471 and 3472 Do Not Impermissibly Conflict and Deprive Defendant of His Right to Present a Defense.

Defendant admits that he did not object to the use of CALCRIM No. 3472, but that the error is cognizable on appeal because we may review claimed instructional error where the defendant's substantial rights are affected. (Pen. Code, § 1259; *People v. Dennis* (1998) 17 Cal.4th 468, 534.) He argues that under principles of self-defense law as expressed in CALCRIM No. 3471, someone who initiates a fight may still prevail on a theory of self-defense if they withdraw from the fight, and their opponent responded with a counter-attack justifying the defendant's immediate response. (*People v. Quach* (2004) 116 Cal.App.4th 294, 300-303.) However, he argues, CALCRIM No. 3472 removes both grounds from the jury's consideration by providing the theory of self-defense is not available to someone who "provokes a fight or quarrel with the intent to create an excuse to use force."

We disagree with defendant's analysis because the instructions are a correct statement of the law and do not conflict. Self-defense is perfect or imperfect. A defendant may assert perfect self-defense where he or she has an actual and reasonable belief in the necessity of defending himself or herself from imminent danger of death or great bodily injury. If a killing is committed in perfect self-defense, it is justifiable homicide. (*People v. Randle* (2005) 35 Cal.4th 987, 994.) Imperfect self-defense occurs where the defendant's belief is unreasonable. "Imperfect self-defense mitigates, rather than justifies, homicide; it does so by negating the element of malice." (*Ibid.*) For that reason, a person acting in imperfect self-defense can be guilty of no crime greater than voluntary manslaughter. (*Id.* at p. 995.) On the other hand, one who contrives self-defense is not entitled to assert the defense at all. (*People v. Hinshaw* (1924) 194 Cal. 1, 26.)

Within the context of a defendant's right to assert self-defense, CALCRIM No. 3472 states that if defendant had the intent to create a pretext to use force against another, he is not entitled to rely on self-defense. However, if the jury were to conclude defendant lacked the intent to create a pretext, it could evaluate whether the defendant's

belief in imminent danger of death or great bodily injury was reasonable or unreasonable. If defendant's belief was reasonable, he would be entitled to a verdict of not guilty; if his belief was unreasonable, under the doctrine of imperfect-self-defense, the jury would be required to convict him of voluntary manslaughter instead of murder.

These instructions are a correct statement of the law. Any implication of potential jury confusion was addressed by the court's appropriate response to the question. We presume the jury followed the legally correct instructions given to it. (*People v. Murtishaw* (1989) 48 Cal.3d 1001, 1044.)

III. FLIGHT INSTRUCTION.

A. Factual Background.

Over defendant's objection, the trial court instructed the jury with CALCRIM No. 372. Defendant argued that "given the nature of this particular case, everyone took off from this party. It wasn't just that the defendant left." The trial court noted that, under *People v. Mason* (1991) 52 Cal.3d 909, 943, if the evidence identifies the defendant as the person who fled and this evidence is relied on as tending to show guilt, it is proper to give a flight instruction.

The court further noted that there was conflicting evidence that defendant was the perpetrator. "If the jury were to accept the evidence that he is [the perpetrator], then the fact that he ran would tend to show a consciousness of guilt and there's both attempt[ed] murder, there's attempt[ed] premeditated deliberate murder. There's now going to be attempt[ed] voluntary manslaughter. So there's different mental states that the jury has to evaluate. . . . [¶] . . . It's up to the jury to decide the meaning and importance of the conduct. It's not evidence in and of itself to prove guilt. . . . [Defendant can] still [ ] argue . . . [that] everybody ran."

B. Discussion.

Defendant argues that although a flight instruction is proper to demonstrate consciousness of guilt, where identity is a contested issue at trial, the instruction is appropriate only where there is substantial evidence of flight by the defendant apart from his identification as the perpetrator. (*People v. Mason, supra,* 52 Cal.3d at p. 943; *People*

v. Martinez (1989) 207 Cal.App.3d 1204, 1215.) In this case, he argues, because the instruction should not have been given, it lessened the prosecution's burden of proof and violated his due process rights and right to a jury trial. We disagree.

A flight instruction in general is proper where the evidence shows that the defendant leaves the crime scene under circumstances suggesting his movement was motivated by a consciousness of guilt. (*People v. Bradford* (1997) 14 Cal.4th 1005, 1055.) However, a flight instruction may be improper if identity is the only issue in a case. "[T]hat a certain person was observed fleeing [from a crime scene] and thereby manifested a consciousness of guilt is of no consequence unless the person fleeing was the defendant. (*People v. London* (1988) 206 Cal.App.3d 896, 903.) However, even where identity is one of the issues, a flight instruction is proper if supported by substantial evidence. (*People v. Martinez, supra,* 207 Cal.App.3d at p. 1214.) Thus, "[i]f there is evidence identifying the person who fled as the defendant, and if such evidence 'is relied upon as tending to show guilt,' then it is proper to instruct on flight." (*People v. Mason, supra,* at p. 943.) In the situation where identity is an issue, the jury is required to proceed logically by first deciding whether the person who fled was the defendant. If it so decides, the jury must then determine how much weight it should accord to the defendant's flight in resolving the other issues bearing on guilt. (*Ibid*.)

Here, the instruction was proper because there was substantial evidence that defendant was the perpetrator: Mejia, Cecil, and Hernandez all testified defendant was the shooter. Further, there was evidence that although defendant left the scene of the crime, contrary to his assertion, others remained behind, including Hernandez.

IV. NO CUMULATIVE ERROR.

Defendant argues that the errors complained of here impacted his ability to present a meaningful defense in violation of his due process right to a fair trial because the erroneous jury instructions removed from the jury's consideration of his theory of self-defense.

We disagree. In examining a claim of cumulative error, the critical question is whether defendant received due process and a fair trial. (*People v. Cain* (1995) 10

Cal.4th 1, 82.) A predicate to a claim of cumulative error is a finding of error. Obviously there can be no cumulative error if the challenged rulings were not erroneous. (*People v. Hawthorne* (1992) 4 Cal.4th 43, 79; *People v. Bradford* (1997) 15 Cal.4th 1229, 1382 [no cumulative error where court "rejected nearly all of defendant's assignments of error"].) Our review of the record assures us that defendant received due process and a fair trial. (See *People v. Ashmus* (1991) 54 Cal.3d 932, 1006.)

DISPOSITION

The judgment of the superior court is affirmed.

ZELON, J.

We concur:

PERLUSS, P. J.

JACKSON, J.